

## Message Text

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JUSTICE - B. RASHKOW

INTERIOR - MR. ELLIOT

EUR/CAN - MR. ROUSE

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FM SECSTATE WASHDC

TO AMEMBASSY OTTAWA

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E.O. 11652: N/A

TAGS: SENV, PGOU, CA

SUBJECT: BEAUFORT SEA

1) EMBASSY IS REQUESTED TO DELIVER THE FOLLOWING NOTE TO  
DEPT. EXTERNAL AFFAIRS AT THE EARLIEST POSSIBLE DATE:

BEGIN TEXT: THE EMBASSY OF THE UNITED STATES PRESENTS ITS  
COMPLIMENTS TO THE DEPT. OF EXTERNAL AFFAIRS AND HAS THE  
HONOR TO REFER TO THE DISCUSSIONS WHICH TOOK PLACE BETWEEN  
THE UNITED STATES AND CANADA ON THE MORNING OF APRIL 8, 1976  
CONCERNING LIABILITY AND COMPENSATION ARRANGEMENTS IN CONN-  
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ECTION WITH PROPOSED CANADIAN DRILLING IN THE OPEN WATERS OF  
THE BEAUFORT SEA.

THE USG HAS REVIEWED CANADIAN PROPOSALS PRESENTED AT THIS

MEETING. ON THE BASIS OF THIS REVIEW, THE USG REQUESTS CONFIRMATION OF CERTAIN UNDERSTANDINGS REGARDING SUCH PROPOSALS, AS WELL AS FURTHER INFORMATION CONCERNING A NUMBER OF QUESTIONS WHICH HAVE ARISEN CONCERNING THE LEGAL EFFECT AND OPERATION OF THE PROPOSALS SO THAT AN INFORMED JUDGMENT MAY BE MADE AS TO WHETHER THE PROPOSALS, AS THEY WOULD BE IMPLEMENTED: 1) WOULD BE VIABLE IN THE SENSE OF PROVIDING ADEQUATE AND PROMPT COMPENSATION TO UNITED STATES INTERESTS THAT MAY BE INJURED AS A RESULT OF CANADIAN ACTIVITIES IN THE BEAUFORT SEA; 2) WOULD, IN FACT, ACHIEVE THEIR STATED PURPOSE OF EXTENDING REMEDIES TO U.S. AND CANADIAN CLAIMANTS ON A NON-DISCRIMINATORY BASIS: AND 3) COMPARABLE TO U.S. REMEDIES PROVIDED TO CANADIAN INTERESTS INJURED BY POLLUTION CAUSED BY U.S. ACTIVITIES. THE ACCOMPANYING ANNEX SETS FORTH A LIST OF SUCH UNDERSTANDINGS AND SUCH QUESTIONS.

IN VIEW OF THE TIME PRESSURE IMPOSED BY THE SCHEDULE OF PROPOSED DRILLING ACTIVITIES, THE GOVERNMENT OF THE UNITED STATES WISHES TO ENSURE THAT ADEQUATE COMPENSATION ARRANGEMENTS WILL BE IN PLACE AS SOON AS POSSIBLE. IN THIS REGARD, THE USG WOULD APPRECIATE INFORMATION CONCERNING THE TIMING OF THE NEXT STEPS OF THE DRILLING AUTHORIZATION PROCESS, SO THAT FUTURE DISCUSSIONS -- INCLUDING ALTERNATIVES OTHER THAN THE CANADIAN PROPOSALS, SHOULD IT NOT PROVE POSSIBLE TO SATISFACTORILY RESOLVE PROBLEMS WHICH MAY ARISE REGARDING THESE PROPOSALS -- MAY BE ORGANIZED IN A TIMELY MANNER. THE USG ALSO REQUESTS CANADIAN CONFIRMATION THAT THE APRIL 15 DECISION OF THE CANADIAN CABINET TO AUTHORIZE DRILLING IN THE OPEN WATERS OF THE BEAUFORT SEA HAS NOT LIMITED CANADIAN OR U.S. OPTIONS WITH REGARD TO THE LIABILITY PROPOSALS PRESENTED AT THE APRIL 8 MEETING.

THE USG PROPOSES THAT THE NEXT TECHNICAL LIABILITY DISCUSSIONS BE ARRANGED AS SOON AS POSSIBLE.

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THE EMBASSY OF THE UNITED STATES TAKES THIS OPPORTUNITY TO AGAIN CONVEY TO THE DEPARTMENT OF EXTERNAL AFFAIRS THE ASSURANCES OF ITS HIGHEST CONSIDERATION" END TEXT.

2) EMB. IS REQUESTED TO DELIVER THE FOLLOWING ANNEX TO DEPARTMENT OF EXTERNAL AFFAIRS SIMULTANEOUSLY WITH DELIVERY OF FOREGOING NOTE.

BEGIN TEXT OF ANNEX:

SUMMARY OF UNDERSTANDINGS:

BASED ON THE DISCUSSIONS WHICH OCCURRED AT THE APRIL 8

MEETING, THE U.S. HAS THE FOLLOWING UNDERSTANDINGS CONCERNING THE LIABILITY PROPOSALS WHICH WERE PRESENTED AND WOULD APPRECIATE GOC CONFIRMATION OF THIS.

- 1) BOTH PARTIES AGREED THAT SUITABLE LANGUAGE WOULD BE WORKED OUT IN ORDER TO AVOID PREJUDICING EITHER GOVERNMENT'S BOUNDARY POSITION.
- 2) THE PROPOSED INSURANCE ARRANGEMENTS WILL HAVE A LIABILITY LIMIT OF \$50,000,000 PER INCIDENT AND WILL COMPENSATE CLAIMANTS WHETHER OR NOT THE INSURED WAS THE CAUSE OF THE DAMAGE.
- 3) THE SOLE DEFENSE THAT COULD BE ASSERTED UNDER EITHER THE ACT OR THE PROPOSED ARRANGEMENTS BY EITHER THE INSURED OR THE INSURER AGAINST CLAIMANTS FOR POLLUTION DAMAGE WOULD BE THAT OF CONTRIBUTORY NEGLIGENCE OF THE CLAIMANT.

QUESTIONS:

THE FOLLOWING LIST OF QUESTIONS IS NOT EXHAUSTIVE, AND OTHER QUESTIONS WILL BE RAISED IN THE COURSE OF FUTURE DISCUSSIONS. THE PROPOSED ARRANGEMENTS ARE NOVEL, AND CONSIST OF SEVERAL DISTINCT ELEMENTS; THUS, IN SOME CASES, SIMILAR QUESTIONS WERE ADDRESSED TO DIFFERENT ELEMENTS, ON THE ASSUMPTION THAT ANSWERS TO THESE QUESTIONS MIGHT DIFFER DEPENDING UPON THE CHARACTER OF THE PARTICULAR ELEMENT ADDRESSED.

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TIONS MIGHT DIFFER DEPENDING UPON THE CHARACTER OF THE PARTICULAR ELEMENT ADDRESSED.

I. RIGHTS AVAILABLE UNDER CANADIAN LAW TO CANADIANS FOR POLLUTION OF THE ARCTIC AREA OF CANADA

- 1) DOES THE TERM "PERSON" IN 4(1), 5, 6, AND ELSEWHERE IN THE ARCTIC WATERS POLLUTION PREVENTION ACT (HEREINAFTER "THE ACT") INCLUDE ALL FORMS OF ASSOCIATIONS, INCORPORATED AND UNINCORPORATED, AS WELL AS ALL FORMS OF STATE AND LOCAL GOVERNMENT ENTITIES?
- 2) SECTION 6 OF THE ACT REFERS TO REGULATIONS MADE UNDER SECTION 9. HAVE ANY REGULATIONS BEEN ISSUED UNDER SECTION 9 AND, IF SO, MAY WE HAVE COPIES OF THOSE REGULATIONS?
- 3) SECTION 6(1)(D) CREATES LIABILITY FOR COSTS AND EXPENSES OF AND INCIDENTAL TO ACTION TAKEN TO REPAIR OR REMEDY ANY CONDITION THAT RESULTS FROM A PROHIBITED DEPOSIT OF WASTE OR TO REDUCE OR MITIGATE ANY DAMAGE

TO OR DESTRUCTION OF LIFE OR PROPERTY THAT RESULTS OR MAY BE REASONABLY EXPECTED TO RESULT FROM SUCH DEPOSIT OF WASTE REASONABLY INCURRED AT THE DIRECTION OF THE CANADIAN GOVERNMENT. SECTION 6(2) SPECIFICALLY PROVIDES THAT THE CANADIAN GOVERNMENT CAN RECOVER THESE COSTS. NO SECTION PROHIBITS OTHER PERSONS WHO INCUR SUCH COSTS, "AT THE DIRECTION OF THE GOVERNOR IN COUNCIL" FROM RECOVERING THESE COSTS. IF, FOR EXAMPLE, A PROVINCIAL OR LOCAL GOVERNMENT ENTITY INCURRED SUCH COSTS IN CONNECTION WITH ITS OBLIGATIONS UNDER A JOINT CONTINGENCY PLAN ENTERED INTO BY THE CANADIAN GOVERNMENT, COULD THAT LOCAL GOVERNMENT ENTITY RECOVER THESE COSTS UNDER SECTION 6(1)(D)?

4) CAN COSTS AND EXPENSES INCIDENT TO PREVENTIVE ACTION, I.E., ACTION TAKEN BEFORE ACTUAL DEPOSIT OF ASBESTOS BUT WHERE THERE IS AN IMMINENT THREAT OF SUCH DEPOSIT, BE RECOVERED UNDER THE ACT?

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5) WHAT IS MEANT BY THE TERMS "CAUSED OR BY OTHERWISE ATTRIBUTABLE TO THAT ACTIVITY OR UNDERTAKING OR THAT SHIP AS THE CASE MAY BE" AS USED AT THE CONCLUSION OF SECTION 6? DO THESE TERMS, DESPITE THE REFERENCE IN SECTION 7 TO THE ABSOLUTE NATURE OF LIABILITY, PERMIT A DEFENSE OF SOME INTERVENING SUPERSEDING CAUSE SUCH AS AN ACT OF GOD OR ACT OF WAR?

6) WHAT ARE THE COURTS OF COMPETENT JURISDICTION IN CANADA REFERRED TO IN 6(3)?

7) SECTION 8(2) PROVIDES THAT EVIDENCE OF FINANCIAL RESPONSIBILITY SHALL BE IN A FORM THAT WILL ENABLE ANY PERSON ENTITLED PURSUANT TO SECTION 6 TO CLAIM AGAINST THE PERSON GIVING SUCH EVIDENCE TO RECOVER DIRECTLY FROM THE PROCEEDS OF SUCH INSURANCE OR BOND. DOES THIS PROVISION REQUIRE THAT EVIDENCE OF RESPONSIBILITY BE IN A FORM WHICH WILL ENABLE CLAIMANTS TO PROCEED DIRECTLY AGAINST THE INSURER OR OTHER, GIVING SUCH EVIDENCE WHEREVER SUCH PERSON MAY BE FOUND, EITHER WITHIN CANADA OR WITHIN THE UNITED STATES?

II. RIGHTS AVAILABLE TO UNITED STATES CITIZENS  
GENERALLY (IN THIS REGARD, SEE GENERALLY  
CANADIAN AIDE-MEMOIRE ON THIS SUBJECT, DATED  
MAY 29, 1975).

1) IS AN ALIEN RESIDENT IN CANADA IN THE SAME LEGAL POSITION WITH RESPECT TO RIGHTS TO RECOVER FOR POLLUTION INJURIES AS A CANADIAN CITIZEN? HOW IS RESIDENCY DEFINED FOR THIS PURPOSE UNDER CANADIAN LAW? DOES

OWNERSHIP OF REAL PROPERTY OR OPERATION OF AN OFFICE CONSTITUTE RESIDENCY?

2) IF THE U.S. GOVERNMENT OR A STATE TOOK ACTION IN THE WATERS DESCRIBED IN THE ACT, COULD IT RECOVER ITS COSTS AND EXPENSES UNDER 6(1)(D) DIRECTLY FROM THE DISCHARGER IN A CANADIAN COURT?

3) WOULD NON-RESIDENT AMERICAN FISHERMEN ENTITLED TO FISH IN THE WATERS COVERED BY THE ACT BE ENTITLED TO UNCLASSIFIED

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RECOVER IN CANADIAN COURTS FOR INJURIES SUSTAINED BY A

PROHIBITED DEPOSIT OF WASTE IN THE SAME MANNER AS CANADIAN FISHERMEN? (MAY 29 AIDE-MEMOIRE P. 10: PART XX OF CANADA SHIPPING ACT DOES NOT EXTEND TO AMERICAN FISHERMEN.)

4) WOULD OTHER NON-RESIDENT AMERICANS SUFFERING INJURY IN THE WATERS COVERED BY THE ACT, WHILE LAWFULLY PRESENT IN THOSE WATERS, BE PERMITTED TO RECOVER IN CANADIAN COURTS FOR INJURIES SUSTAINED AS A RESULT OF A PROHIBITED DEPOSIT OF WASTE TO THE SAME EXTENT AS SIMILARLY INJURED CANADIANS?

### III. RIGHTS OF UNITED STATES CLAIMANTS UNDER PROPOSED ARRANGEMENTS

#### A. DRILLING AUTHORITY - INSURANCE CONDITION

1) UNDER WHAT AUTHORITY WOULD THE DRILLING CONDITION BE ISSUED -- STATUTES OR OTHER SOURCES OF LAW? DOES ATTACHING THE INSURANCE CONDITION TO THE DRILLING AUTHORITY GIVE THE CONDITION THE FORCE OF LAW IN THE SENSE OF ADMINISTRATIVE REGULATIONS? IN THIS RESPECT, SINCE THE GEOGRAPHIC SCOPE OF THE CONDITION IS OUTSIDE THAT OF THE ACT, IS THERE AN ULTRA VIRES PROBLEM?

2) WHO WOULD BE BOUND BY THE DRILLING AUTHORITY I.E., WHO IS THE "OPERATOR"? TO WHOM IS THE AUTHORITY ISSUED? WHAT PARTIES WILL IN ANY MANNER UNDERTAKE OR PARTICIPATE IN THE DRILLING (E.G., SUBCONTRACTORS)?

3) WHAT OBLIGATIONS WILL THE CANADIAN GOVERNMENT ASSUME UNDER THE DRILLING AUTHORITY TOWARD PERSONS INJURED IN WATER OR ON LAND NOT COVERED BY THE ACT AS A RESULT OF AN UNLAWFUL DEPOSIT OF WASTE IN ARCTIC WATERS? IS THE CANADIAN GOVERNMENT ASSUMING AN OBLIGATION TO COMPENSATE SUCH PERSONS? IF THE CANADIAN GOVERNMENT IS NOT ASSUMING SUCH AN OBLIGATION, WHAT OBLIGATIONS WOULD IT ASSUME UNDER THE DRILLING AUTHORITY? ARE ANY OF THE OBLIGATIONS DE-

SCRIBED ABOVE ENFORCEABLE BY AN AMERICAN CLAIMANT IN A  
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CANADIAN COURT? IF SO, BY WHAT PROCEDURES, AND IN WHICH  
COURTS? WOULD A JUDGMENT BY AN AMERICAN COURT AGAINST  
THE OPERATOR CONSTITUTE A JUDGMENT OF A COURT OF COMPE-  
TENT JURISDICTION WITHIN THE MEANING OF THE INDEMNIFICA-  
TION PROVISION OF SECTION 2?

4) WHAT IS THE STATUS OF THE PROPOSED INSURANCE  
POLICY UNDER CANADIAN LAW? ARE THERE ANY SPECIAL PROVI-  
SIONS OF INSURANCE LAW WHICH WOULD APPLY TO DKTERMINATION  
OF AND COMPENSATION FOR DAMAGE CLAIMS UNDER THE POLICY?  
IS THE NAME OF THE INSURER PRESENTLY KNOWN? IF SO, WOULD  
THE GOC PROVIDE INFORMATION CONCERNING THE INSURER'S OWNER-  
SHIP, FINANCIAL ASSETS, PAYMENT RECORD, ANY STATISTICS  
ON LITIGATION, RECORD AND TIME LAG BETWEEN PRESENTATION  
OF CLAIMS AND ULTIMATE PAYMENT?

5) WHAT PARTIES WOULD BE INSURED UNDER THE PROPOSED  
POLICY AND TO WHAT EXTENT, IF ANY, WOULD SUCH PARTIES  
DIFFER FROM THE PARTIES TO WHOM THE LIABILITY AND FINAN-  
CIAL RESPONSIBILITY PROVISIONS OF THE ACT APPLY?

6) HOW DETAILED ARE THE DAMAGE PROVISIONS OF THE  
PROPOSED POLICY? WOULD THEY COVER A BROADER RANGE OF  
DAMAGES THAN THAT CONTEMPLATED UNDER THE ACT? IF NOT,  
COULD THEY BE SO DRAFTED?

7) UNDER THE DRILLING AUTHORITY, WHAT OBLIGATIONS  
WOULD THE INSURER HAVE TO INJURED UNITED STATES  
CITIZENS? COULD U.S. CLAIMANTS PROCEED DIRECTLY AGAINST  
THE INSURER IN CANADA AND/OR IN THE UNITED STATES ON THE  
BASIS OF THE DRILLING AUTHORITY? IF SO, IN WHAT CAPACITY -  
THIRD-PARTY BENEFICIARY, BENEFICIARY OF STATUTE OR REGULA-  
TION, INSURANCE LAW? WHAT PROCEDURES ARE CONTEMPLATED  
IN ORDER TO EFFECT ANY RECOVERY AVAILABLE TO U.S. CLAIMANTS?  
WOULD THE PROCEDURES CONTEMPLATED UNDER PARAGRAPH 3(D)(1)  
DIFFER IN ANY RESPECT FROM THOSE CONTEMPLATED FOR CANA-  
DIAN CLAIMANTS UNDER SECTIONS 8(2) OR 6(3) OF THE ACT?  
HOW? WHAT WOULD BE THE LEGAL AND/OR PRACTICAL REASONS FOR  
SUCH DIFFERENTIATION?

B. AGREEMENT  
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1) UNDER WHAT AUTHORITY WOULD THE PROPOSED AGREE-  
MENT BE CONCLUDED -- STATUTE OR OTHER SOURCE OF LAW?

2) WHO WOULD BE BOUND BY THE AGREEMENT UNDER CANA-

DIAN LAW? (E.G., SUBCONTRACTORS OF DOME, OTHER OPERATORS ACTING IN CONCERT WITH DOME)?

3) HOW AND BY WHAT PROCEDURES DOES GOC CONTEMPLATE IMPLEMENTATION OF ITS RIGHTS UNDER THE AGREEMENT TO SETTLE DAMAGE CLAIMS? WHAT OBLIGATIONS WILL CANADIAN GOVERNMENT ASSUME UNDER THE AGREEMENT TO U.S. CLAIMANTS INJURED BEYOND THE AREA COVERED BY THE ACT? IF THE CANADIAN GOVERNMENT WILL NOT ASSUME ANY OBLIGATION TO COMPENSATE INJURED U.S. INTERESTS, WHAT OBLIGATIONS WOULD IT BE ASSUMING UNDER THE AGREEMENT? WHAT ARE THE COMPARATIVE RIGHTS OF THE GOC AND U.S. CLAIMANTS? WOULD THE GOC CONCEIVABLY HAVE THE OPTION TO

BLOCK ASSERTION OF U.S. CLAIMS UNDER THE AGREEMENT?

4) DOES PARAGRAPH 4(D) OF THE AGREEMENT REQUIRE DOME TO MAINTAIN INSURANCE AGAINST WHICH A U.S. CLAIMANT COULD PROCEED DIRECTLY IN CANADA? IN THE U.S.? WHAT OBLIGATIONS DOES THE INSURER HAVE TO COMPENSATE U.S. CITIZENS CLAIMING FOR INJURIES INCURRED BEYOND THE AREA COVERED BY THE ACT UNDER THE AGREEMENT? COULD SUCH U.S. CLAIMANTS PROCEED DIRECTLY AGAINST THE OPERATOR IN CANADIAN COURTS ON THE BASIS OF THE AGREEMENT? IF SO, IN WHAT CAPACITY -- THIRD-PARTY BENEFICIARY?

5) UNDER THE AGREEMENT, WHAT OBLIGATIONS WOULD THE INSURER HAVE TO COMPENSATE U.S. CLAIMANTS FOR INJURIES INCURRED BEYOND THE AREA COVERED BY THE ACT? COULD U.S. CLAIMANTS PROCEED DIRECTLY AGAINST THE INSURER IN CANADIAN COURTS ON THE BASIS OF THE AGREEMENT? IF SO, IN WHAT CAPACITY -- THIRD-PARTY BENEFICIARY? INSURANCE LAW?

6) ARE ANY OF THE OBLIGATIONS OF THE GOC, DOME, OR THE INSURER, DESCRIBED ABOVE, ENFORCEABLE IN A CANADIAN COURT? IF SO, WHICH OBLIGATIONS, BY WHAT PROCEDURES, BY WHOM, AND IN WHAT COURTS?  
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7) UNDER PARAGRAPH 7 OF THE AGREEMENT, COULD ANY ONE OF THE FOLLOWING PARTIES, ACTING ALONE, REFER A DISPUTE TO ARBITRATION BY A JUDGE OF THE TRIAL DIVISION OF THE FEDERAL COURT OF CANADA: THE GOC, DOME, THE INSURER, U.S. CLAIMANTS? IF AGREEMENT IS REQUIRED TO REFER A DISPUTE TO ARBITRATION, WHICH OF THE AFOREMENTIONED PARTIES MUST GIVE THEIR CONSENT? DOES REFERRAL TO A JUDGE OF THE TRIAL DIVISION CONSTITUTE THE INITIATION OF LITIGATION IN THAT COURT? DOES PARA. 7 CONTEMPLATE BINDING ARBITRATION OF SUCH A DISPUTE BY THAT JUDGE? IF SO, DOES THE AWARD OF THE JUDGE CONSTITUTE EITHER A JUDGMENT BY A COURT -OF COMPETENT JURISDICTION OR A VOLUNTARY SETTLEMENT UNDER PARA 2 OF THE AGREEMENT? WHAT LAW AND WHAT PROCEDURES WOULD APPLY TO THE ARBITRATION? COULD SPECIFIC PROCEDURES AND

A LIST OF COMPENSABLE DAMAGES BE PROVIDED FOR IN PARA 7? IS THERE TO BE ANY APPEAL FROM AN AWARD UNDER THIS PARAGRAPH? HOW WOULD AN ARBITRAL AWARD BE ENFORCED?

8) WOULD A JUDGMENT BY AN AMERICAN COURT AGAINST DOME CONSTITUTE A JUDGMENT OF A COURT OF COMPETENT JURISDICTION UNDER PARA. 2 OF THE AGREEMENT?

9) WHAT IS THE MEANING OF THE WORDS "ALL PERSONS" UNDER PARA 1? IS THE MEANING THE SAME AS UNDER THE ACT?

IF NOT, COULD THE MEANING BE BROADENED?

C. GENERAL

1) WHAT/THE INTERRELATIONSHIPS OF THE INSURANCE CONDITION, THE AGREEMENT AND THE ACT? FOR EXAMPLE, WOULD THE TWO-YEAR STATUTE OF LIMITATIONS CONTAINED IN SECTION 6(4) OF THE ACT OR THE STATUTE OF LIMITATIONS APPLICABLE TO CONTRACTS GENERALLY APPLY TO U.S. CLAIMS PURSUANT TO THESE ARRANGEMENTS? SIMILARLY, WOULD A CANADIAN COURT BE EXPECTED TO TREAT U.S. CLAIMS AS THOUGH THEY HAD ARISEN UNDER THE ACT OR WOULD MORE GENERAL COMMON LAW PRINCIPLES BE APPLIED?

2) WHAT WOULD BE THE ESTIMATED TIME LAG (MAXIMUM UNCLASSIFIED

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AND MINIMUM LIMITS) BETWEEN SEEKING COMPENSATION FROM THE GOC, THE INSURER OR THE INSURED UNDER ANY OF THE PROPOSED ARRANGEMENTS AND ULTIMATE PAYMENT OF CLAIMS?

3) IF DAMAGES CAUSED BY A BLOWOUT WERE TO EXCEED \$50 MILLION, HOW WOULD THE INSURANCE FUND BE APPORTIONED? WOULD THERE BE ANY PRIORITIES? WOULD ANY DISTINCTIONS BE DRAWN BETWEEN U.S. AND CANADIAN CLAIMS? IF SO, ON WHAT LEGAL BASIS? SISCO

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